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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1149

GARRETT H. BYRNE, ET AL., APPELLANTS

v.

SERAFIM KARALEXIS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

An important aspect of the holding of the court below was its decision that a publication (here, a movie) [1] assumed to be obscene could be commercially

[1] Involved in the case is the film "I Am Curious (Yellow)," which the court below assumed to be obscene under current legal standards (see A. 33). The government takes no position regarding the obscenity of this movie (see *United States* v. *A Motion Picture Film Entitled "I Am Curious-Yellow,"* 404 F. 2d 196 (C.A. 2); see also *Grove Press, Inc.* v. *Maryland Board of Censors*, No. 905, this Term, probable jurisdiction noted, March 23, 1970). Whatever might ultimately be concluded as to the obscenity of the film does not detract from the concreteness and substantiality of the issue presented as to the meaning and effect of *Stanley* v. *Georgia*, 394 U.S. 557, nor indicate

distributed without the possibility of a governmental interference as long as the distributors observed certain restrictions. According to the district court, all that was required to obtain First Amendment protection was that minors be excluded; that no pandering advertisements be made; that the public be adequately notified of the possible offensiveness of the publication so as to avoid any unwanted intrusion upon its sensibilities; and, implicity, that the distribution take place at a location where only those wishing to participate had any reason to attend. The court believed that this part of its holding was a logical consequence of this Court's decision last Term in *Stanley* v. *Georgia*, 394 U.S. 557. The court below reasoned that *Roth* v. *United States*, 354 U.S. 476—which permitted state and federal prosecution in relation to all forms of commercial distribution of obscene materials—has been qualified, despite this Court's explicit statement in *Stanley* that no such limitation was intended (394 U.S. at 568).

This holding is of interest to the United States since it brings into question the validity of the array of federal statutes which punish the interstate distribution (18 U.S.C. 1461–1465) and prohibit the importa-

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that the Court should proceed first to resolve whether the film is obscene before considering that question. The *Stanley* issue was considered and decided by the court below, and is one that all lower courts, both state and federal, must of necessity deal with in every obscenity case. It is properly presented for decision here (unless appellants' arguments with respect to the jurisdiction of the district court, on which—without intending to reflect thereon—we take no position, are sustained), and should accordingly be considered and resolved, without regard to whether "I Am Curious (Yellow)" is or is not obscene.

tion (19 U.S.C. 1305(a)) of obscene matter without the limitations the court below concluded were constitutionally required. Indeed, the effect of a similar interpretation of *Stanley* by a three-judge district court in California has resulted in a holding by that court that one of the federal obscenity statutes is unconstitutional on its face—even though the claimant in that case stipulated that he had imported the photographs in question for commercial distribution. *United States* v. *Thirty-Seven Photographs*, Civil No. 69–2242–F (C.D. Cal.).[2] While we have noted an appeal in *Thirty-Seven Photographs*, and will file our ~~Initial~~ Jurisdictional Statement shortly in that case, the case will not be reached and decided until next Term. Accordingly, it seems appropriate to state our views presently as to the reach of *Stanley* and its impact, if any, on *Roth*.

QUESTION PRESENTED

Whether this Court's recent decision in *Stanley* v. *Georgia*, 394 U.S. 557, effectively undermined the doctrine of *Roth* v. *United States*, 354 U.S. 476, pursuant to which federal and state governments were authorized, consistent with the First Amendment, to prohibit the public dissemination of obscene matter.

STATEMENT

The instant case arises from the efforts of the Boston exhibitors of the movie "I Am Curious (Yellow)" to prevent their prosecution under a Massachusetts ob-

[2] The validity of the customs statute under *Stanley* is also *sub judice* before a three-judge court in the Southern District of New York. *United States* v. *Various Articles of Obscene Merchandise*, Civ. No. 68–2972 (S.D.N.Y.).

scenity statute making the importation, publication, and distribution of obscene matter, or possession for such purposes, a criminal offense (Mass. Gen. Laws, Ch. 272, § 28). While other questions are raised by the parties, the crucial aspect of the holding below, insofar as the government is here concerned, is the district court's conclusion that "*Roth* remains intact [after *Stanley*] only with respect to public distribution in the full sense [of obscene matter], and that restricted distribution, adequately controlled, is no longer to be condemned" (A. 35). This conclusion was premised on the following factual findings (A. 32):

> Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginsburg* v. *United States*, 1966, 383 U.S. 463. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter.

Based on those findings, the court below concluded that the Massachusetts statute could not be constitutionally applied to the exhibitors even if the film were obscene, which was assumed for purposes of its decision (see note 1, *supra*). It reasoned that *Stanley* v. *Georgia*, *supra*, recognized a constitutional "right to receive" or view obscene materials; that there must be, as a result, some right of public distribution of such materials so that they might be received; and that therefore any distribution is constitutionally protected which does not involve the matters recognized in *Stan-*

ley as properly subject to governmental regulation—dissemination that might reach minors; distribution likely to intrude upon and offend unwilling members of the public; and (by implication) pandering advertisements (see 394 U.S. at 567).[3] Since the court below found that none of these matters was involved here, it determined that the film's distribution was constitutionally protected, and temporarily enjoined appellants from interfering with that distribution so long as the mode of distribution remained the same.[4] One judge dissented, stating that nothing in *Stanley* was intended to limit or undermine *Roth* (A. 38–41).

INTRODUCTION AND SUMMARY OF ARGUMENT

As noted previously, the concern of the United States in this case relates to the meaning and scope of *Stanley* v. *Georgia, supra,* and its impact, if any, on *Roth* v. *United States, supra.* It is our view that in *Stanley* this Court meant only to hold what it said it was holding: that governmental authority may not lawfully interfere with an individual's right privately to possess obscene materials in his home. It did not, we submit, emasculate the *Roth* doctrine by further holding, as the district court concluded, that those who publicly distribute obscene materials are entitled to First Amendment protection where they place "adequate" controls, reflective of other decisions of this Court in the obscenity context, on the distribution of such materials.

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[3] See *Ginsberg* v. *New York*, 390 U.S. 629; *Redrup* v. *New York*, 386 U.S. 767; *Ginzburg* v. *United States*, 383 U.S. 463.

[4] An application to stay the temporary injunction was granted by this Court on December 15, 1969 (396 U.S. 976).

ARGUMENT

Nothing in *Stanley* v. *Georgia*, we submit, was intended to provide constitutional protection for the public dissemination—as distinguished from private possession—of obscene materials.

1. We start with the decision in *Stanley* itself. In that case state agents entered the appellant's home acting under a search warrant authorizing them to seize evidence of bookmaking activity. In the course of their search they came upon a roll of movie film and a projector. Upon viewing the film they concluded that it was obscene and arrested the appellant. He was thereafter convicted under state law (Ga. Code Ann. 26–6301 (Supp. 1968)) for "knowingly hav[ing] possession of * * * obscene matter," and the Supreme Court of Georgia affirmed (see 394 U.S. at 558–559). Proceeding on the assumption that the film was obscene under "any of the tests advanced by members of this Court" (394 U.S. at 559, n. 2), the conviction was reversed by this Court. The express holding of the majority was that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime" (*id.* at 568).[2] The Court's

[2] Mr. Justice Black concurred on the ground that the First Amendment bars government from making any law restricting speech or press, whether termed obscene or not (394 U.S. at 568–569). Mr. Justice Stewart, joined by Mr. Justice Brennan and Mr. Justice White, concurred on the ground that the search and seizure violated the express guarantees of the Fourth Amendment made applicable to the states under the Fourteenth Amendment under *Mapp* v. *Ohio*, 367 U.S. 643, in that the search for and seizure of the film exceeded the limits authorized by the warrant (see 394 U.S. at 571–572).

opinion made plain that the decision was essentially grounded on a combination of the Fourth Amendment proscription on "unwanted governmental intrusions into one's privacy" (*id.* at 564) and the First Amendment prohibition of government "control [over] the moral content of a person's thoughts" (*id.* at 565). As the Court phrased the issues posed in the case (394 U.S. at 565):

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library * * *. If the First Amendment means anything, it means that a State has no business telling a man sitting alone in his own house, what books he may read or what films he may watch.[6]

At the same time, however, the majority expressly disavowed any intent to limit the *Roth* doctrine. It pointed out that neither *Roth* nor the cases which had followed it had involved "a statute punishing mere private possession of obscene material," but rather had dealt "with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter" (*id.* at 561; see also *id.* at 563–564, 566). Indeed, the Court explicity stated at the conclusion of its opinion: "*Roth* and the cases following that deci-

[6] Just preceding the language quoted in the text the Court had quoted from Mr. Justice Brandeis' well-known dissent in *Olmstead* v. *United States*, 277 U.S. 438, 478, a Fourth Amendment case.

sion are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home" (*id.* at 568).

Despite the explicit disclaimer in *Stanley* of any intent to impair *Roth*, the court below nevertheless found that the decision in *Stanley* necessarily had that effect. The court below reached its conclusion by reasoning that, since this Court had held that the appellant in *Stanley* was protected by the First Amendment even though the material in his possession was assumed to be obscene, the Court must, at least in part, have rejected the statement in *Roth* (354 U.S. at 485) that "obscenity is not within the area of constitutionally protected speech or press" (see A. 34). The court below buttressed its argument by relying upon *Stanley*'s rejection of the "clear and present danger" argument in attempted justification of the Georgia possession statute, and upon *Stanley*'s examples of legitimate state concern that obscenity not fall into the hands of children or intrude upon the privacy of the general public as support for the view that a distributor who provides against such dangers is entitled to constitutional protection against prosecution for violation of obscenity statutes. The court below concluded (A. 35):

> [W]e think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned.

> It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier. A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. * * * If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.

2. It is our submission that the district court's analysis misconceives the carefully reasoned rationale and limited holding of *Stanley*. This Court was not there saying that materials otherwise obscene are somehow rendered non-obscene because they are privately possessed; rather, it was protecting an individual's right to read or view materials, whether or not they might be subject to the obscenity laws in a different context, in the privacy of his home. Nor was the Court there holding that commercial sources of obscene materials are necessarily free from governmental sanction in order that the personal taste of a prospective purchaser could be satisfied; *Stanley* simply does not speak to this question, despite the Court's passing reference to "the right to receive information and ideas" (394 U.S. at 564).

In our view, *Stanley* teaches that government cannot constitutionally interfere with an individual's private possession of obscene materials in his own home, and that the absence of such authority has nothing to do with the obscenity *vel non* of the materials, but

only with "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man" (*Olmstead* v. *United States*, 277 U.S. 438, 478 (Brandeis J., dissenting); see 394 U.S. at 564). This, we take it, is what the Court in *Stanley* was addressing itself to when it emphasized a person's right to be free from governmental intrusion into his library or the "moral content" of his thought. As the Court put it: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds" (*id.* at 565–566).

It does not follow, however, that this right to be free from governmental interference with the private possession of obscenity carries with it the right to disseminate obscene materials to those desiring them. It is not the content of concededly obscene matter that is entitled to protection under *Stanley*, but simply the unfettered right to read or view what one will when "sitting alone in his own house" (*id.* at 565), however and wherever it might have been obtained. It is this crucial distinction between public distribution and private possession which the Court drew in *Stanley* when it stated: "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" (*id.* at 566).

In short, *Stanley* did not hold that the right privately to possess obscene matter created a correlative right publicly to dispense it.[7] It held only that once such ma-

[7] As this Court has pointed out, albeit in a somewhat different context, "The ability to waive a constitutional right

terials are obtained, irrespective of the fact that they are obscene under any legal test, or were obtained from an unlawful source, the state may not prosecute the possessor for his possession. Such a construction gives full force to the rationale of *Stanley* and at the same time retains the opinion's internal consistency by leaving *Roth* and it progeny intact. *Stanley* did not, in our view, adopt the standard applied by the district court that public distribution of obscene material is constitutionally permissible where the distribution is "adequately controlled" (A. 35).[6] On the contrary, it did not deal with the question of public distribution at all, and the standard in that regard still remains the one developed in *Roth* and the cases that follow it.[7]

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does not ordinarily carry with it the right to insist upon the opposite of that right" (*Singer* v. *United States*, 380 U.S. 24, 34–35).

[6] A number of incongruities flow from the district court's determination that even obscene materials are entitled to constitutional protection, so long as certain factors—*inter alia*, pandering advertisements—are not present. But in *Ginzburg* v. *United States*, 383 U.S. 463, the Court ruled that the manner of distribution (*i.e.*, pandering) was there relevant to determining the obscenity *vel non* of the challenged materials. In this respect, then, the court below has construed *Stanley* as overturning not only *Roth* but *Ginzburg* as well. Unless pandering itself is made a discrete crime, the lower court's caveat in this regard seems to involve a logical inconsistency (see Appellants' Br. 11, n.4).

[7] In the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418, the applicable standard was defined as follows:

"[T]hree elements must coalesce: it must be established that (*a*) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (*b*) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (*c*) the material is utterly without redeeming social value."

3. It might be suggested, we recognize, that the foregoing analysis constitutes an oversimplification of a considerably more complex problem. See, *e.g.*, Katz, *Privacy and Pornography: Stanley* v. *Georgia*, 1969 Sup. Ct. Rev. 203. It is undisputed that the crucial issue here revolves about the lower court's initial legal premise, that *Stanley* recognizes a constitutional "right to receive" materials which are "obscene" in the sense defined by *Roth* and this Court's subsequent decisions following *Roth* (see note 9, *supra*). If there is a right, as such, it is then difficult to contend, under this Court's cases, that there is no corresponding right of dissemination, at least under some circumstances. But while there is language in *Stanley* indicating a recognition of such a right (see 394 U.S. at 564), other language stresses that the government's power to regulate the distribution of obscenity, recognized by *Roth*, remains unimpaired (394 U.S. at 568; see *supra*, pp. 7–8). Properly considered, *Stanley* recognized no constitutional "right to receive" obscene materials; rather, it was premised on a constitutional disability on the part of government to examine the contents of a person's home or office, and attempt to base obscenity prosecutions on materials found there.[10]

The distinction between a "right to receive" and a disability to search, seize and then punish may appear subtle, but is of crucial importance. The claim for a "right to receive" obscene matter

[10] Indeed, it might well be thought that the situation in *Stanley* essentially involved conduct (possession and use of materials) rather than speech (communication of ideas to others by means of writings, films, etc.), and that the First Amendment was relevant principally because it had been charged that the materials involved were obscene.

> misconceives the reasons for which, according to *Stanley*, society stays its hand in the case of private indulgence. It does not acknowledge a "right" to undergo pornographic experiences in private any more than the statute of frauds grants a "right" to breach oral contracts. The law tolerates both because of uniquely remedial considerations. The cure would be worse than the disease. The recognition of this does not mean that society either values the disease or considers it with indifference. Should the repellent activity surface in circumstances not relevant to privacy the law will step in. The privilege recognized in *Stanley* is, in short, a shield for the private citizen, not a sword for the purveyor. [Gegan, *The Twilight of Nonspeech*, 15 Catholic Lawyer 210, 218–219 (1969).]

Thus, we submit, the central thought of *Stanley* is not that the particular books or films an individual has and uses in the privacy of his home or office constitute "speech" protected by the First Amendment (see note 10, *supra*), but rather that the panoply of values which the First Amendment, the Fourth Amendment, and other provisions of the Bill of Rights, seek to protect (cf. *Griswold* v. *Connecticut*, 381 U.S. 479) would be too endangered by the necessarily intrusive inquiry to determine what they comprise.[11]

[11] Even though obscene materials may not constitute speech protected by the First Amendment, the history of obscenity cases in this Court teaches that obscenity is rarely self-identifying; there must be careful examination to determine the issue in each case, and on one side of the line the materials involved are protected. Even absent the threat posed to this protected area by such searches, there would be little purpose served by searching through one man's library—of materials probably already read—to determine on which side of the line individual materials there fell. Given that threat, it is patent that such inquiries cannot be entertained.

Reluctance to permit the state to search through a man's private papers and other forms of communication has a long and distinguished constitutional history. In *Boyd* v. *United States*, 116 U.S. 616, 630, that concern emerged in the form of a relationship between the Fourth and Fifth Amendments; the Fifth Amendment's protection against self-incrimination was held, in effect, to make any search of a person's private papers—where testimonial and communicative in character—unreasonable *per se*:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime * * * is [impermissible]. In this regard the Fourth and Fifth Amendments run almost into each other.

That reluctance also found expression, in a dissent which has since acquired great force—that of Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438, 478—as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." That right, again, is not a legal blessing on what one is doing, but a right not to be interfered with in doing it under private circumstances, a right not to suffer the fear of state intrusion or punishment. It has to do with the First Amendment, then, where books or films are involved and an obscenity prosecution is threatened, but also with the Fourth and Fifth Amendments.

Recent cases in this Court, recognizing a shift in focus on Fourth Amendment issues from property to privacy (cf. *Katz* v. *United States*, 389 U.S. 347, 352–353), have carefully preserved this special aspect of private papers, as materials generally protected against governmental inquiry, search, and seizure. Thus, *Schmerber* v. *California*, 384 U.S. 757, 763–764, in drawing a line between evidentiary searches and testimonial compulsion, was careful to preserve the protection of the privilege to "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." So, also, *Warden* v. *Hayden*, 387 U.S. 294, 303, in overruling cases which had held that searches and seizures could not, under the Fourth Amendment, extend to "mere evidence," nonetheless intimated that certain evidence might not be subject to seizure because its "very nature precludes [it] from being the object of a reasonable search and seizure." The reference was evidently to private papers, the subject of such special protection since *Boyd*.

While the *Stanley* opinion relies principally on the First Amendment rather than the Fourth, we think similar reasoning was of necessity controlling there. Indeed, the right of privacy—the focus of the modern Fourth Amendment—is central to the Court's reasoning in *Stanley*: A search through an individual's books and films to determine which if any might be obscene necessarily takes on aspects which run counter to the central purpose of the Fourth Amendment. Such a search, if not carefully restricted, may expose matters other

than what is being searched for—matters in which the state has no legitimate interest whatever. That sort of intrusion, in turn, implies a supervision of and a chilling effect upon communications, an effect inimical to a free society. Thus, the search found barred by the Fifth Amendment in *Boyd* might also have been barred by the First. And, in the present context, the state's uncertain and undefined interest in learning whether one individual possesses obscene matter for his own use cannot justify the impingement on protected activities that might otherwise result.

Very different considerations apply in the case of commercial distribution of potentially obscene matter. No corresponding right of privacy in places of business open to the public—such as theaters and bookstores [15]—has ever been recognized, and the search for and seizure of materials presented for public dissemination gives rise to no risk that the state will learn what could permissibly be kept from it. One person need not know what is in another's library or desk; but no matter how discreet the storefront or marquee, if the public is informed of the potential offensiveness of what is behind it—as under the district court's decision it must be—there will be many who find that information alone alarming and upsetting. Moreover, while the state may have no sufficient interest in the morality of an individual citizen already in possession

[15] It is difficult to take seriously the district court's suggestion of an equal protection notion operative in this context (see A. 35). The fact is, of course, that a "rich Stanley" can possess and enjoy in the privacy of his home a number of things that a "poorer Stanley" cannot. There is hardly an equal protection right of access to obscene matter.

of materials assumed to be obscene, it does not follow that it has no legitimate interest in the morality of the public at large, and in preserving it from influences which may be harmful to it (Gegan, *supra*, 15 Catholic Lawyer at 218; Appellants' Br. 25–30). *Roth* dispositively established that it is entitled to do so by prohibiting the distribution of matter which is "obscene". Thus, we submit, *Stanley's* disclaimer of any purpose to modify *Roth* in its application to the commercial distribution of pornography can and should be honored. *Stanley* recognized that, for important and compelling reasons, the state has no right to intrude into a private home or office in search of obscenity. That the owner of those places has a constitutional right against intrusion into them does not mean, however, that he has a First Amendment right, as such, to have everything which might otherwise be found there. The First Amendment protects materials otherwise obscene in such circumstances because of the risks to privacy, to protected speech and thought, which would be presented by a governmental search. It does not follow that an individual has a "right to ~~receive~~" obscene materials. It cannot therefore be argued, we submit, that there is any First Amendment right to disseminate such materials.

Finally, even assuming *arguendo* that there is such a protected right to receive obscene materials, it is plainly, under *Stanley*, a personal right that attaches only to the individual who seeks and desires to receive such matter. Commercial distributors of obscene materials simply lack the requisite standing to assert such

a right.[13] Thus, even under this analysis, disseminators of pornography could not claim the protection from criminal prosecution for possession of, or for receiving, obscene materials, that an individual would possess. To say that an individual could not be punished for purchasing an obscene book or film is far different from concluding that the seller would be entitled to share in this protection. There is no constitutional illogic in holding that an exhibitor of an obscene movie could be enjoined from and prosecuted for doing so, but that individuals attending such a showing would not share in his criminal culpability. Pressed to the utmost, *Stanley* surely stands for no more than this.

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[13] Nothing in *Griswold* v. *Connecticut*, 381 U.S. 479, is to the contrary on the question of standing. Although those giving advice regarding contraception were allowed there to assert the constitutional rights of the married persons, the Court specifically noted that the appellants had been tried and convicted "for serving married couples in violation of an aiding-and-abetting statute," and concluded that "[c]ertainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime" (*id.* at 481).

CONCLUSION

For the foregoing reasons, and assuming that the Court reaches the question here discussed, the judgment of the district court should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.,
PETER L. STRAUSS,
Assistants to the Solicitor General.

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

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